81-2107

Office - Supreme Court, U.S.
FILED
MAY 14 1982
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO._____

ALICE LOUISE MILLER, ET AL.,
PETITIONER

VS.

TIM CURRY, DISTRICT ATTORNEY,
TARRANT COUNTY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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I

QUESTIONS PRESENTED FOR REVIEW

1. Does Imbler v. Pachtman, 424 U. S. 409 (1976) immunize a District Attorney from damage actions under 42 U.S.C. §1983 to permit the prosecutor to decline to prosecute, as a matter of policy, family violence cases based solely on gender and marital status?

2. Is a District Attorney absolutely immune from damage actions under 42 U.S.C. §1983 when his willful and voluntary decision not to act deprived the Petitioners of rights and privileges protected and insured by the Constitution and Laws of the United States, to wit: deprivation of life without due process, denial of equal protection of the law and the right of access to courts for redress of grievances?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO._____

ALICE LOUISE MILLER, ET AL.,
PETITIONERS

VS.

TIM CURRY, DISTRICT ATTORNEY,
TARRANT COUNTY, ET AL.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

ALICE LOUISE MILLER, ET AL., the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Texas, entered on the above entitled case on February 17, 1982.

OPINIONS BELOW

The 17th Judicial District Court of Tarrant County, Texas, granted Defendants Motion to Dismiss on March 20, 1981.

The Second Supreme Judicial District Court of Civil Appeals upheld the judgment of the 17th Judicial District on November 25, 1981, and Petitioners' Motion for Rehearing was denied on December 16, 1981. (See Appendix).

The Supreme Court of Texas denied Petitioners' Application for Writ of Error, stating that there was no reversible error, on February 17, 1982. Said decision is a final ruling by the highest Court of the State of Texas.

JURISDICTION

The Judgment of the Supreme Court of Texas (Appendix) was entered on February 17, 1982. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257, Subsection 3, and Supreme Court Rule 19.4.

STATUTE INVOLVED

42 U.S.C. §1983 (1979).

STATEMENT OF THE CASE

Two young women, one black and one white, were brutally and senselessly murdered in Fort Worth, Texas. They never knew each other, yet they shared certain common characteristics in their respective fates; both were killed by men with whom they shared a marital relationship, both were slain in brutal fashion in front of their children, both were killed with handguns, and both had been turned away by the District Attorney after begging for action to be taken against the men who were to kill them.

The linchpin allegation in this case is precisely this: the Tarrant County District

Attorney had a policy and practice of refusing to accept complaints from women who were or had been in a marital or quasi-marital relationship with the men who were brutalizing and terrorizing them.

As set forth in Exhibit "A" to the Plaintiff's Amended Petition (Appendix), the District Attorney deemed such cases to be "doggy", serving no purpose but to clutter up the judicial system.

Cut off from the protection of the criminal justice system, these doggy cases were left to fend for themselves. How did they fare?

Mary Wynell Miller went in person to the Office of the District Attorney seeking to file a complaint against her husband. She had been threatened by him at her home, in public, and, on one occasion, at her place of employment in the presence of three witnesses. But she was just another doggy case to the one public official who could have exercised the police power to protect her. She was just another woman who had made a bad choice and was now crying for help from public office holders with more important things to do. No complaint would be filed, no inquiry would be made for Mary Wynell Miller. Dogs do not warrant such treatment.

On December 6, 1978, Mary Wynell Miller was confronted by her husband as she prepared to get out of her car with her children. As she stepped from the car, she was shot to death in the driveway.

Between December 21, 1979, and January 14, 1980, a period of some twenty-four days, Geral Murrell lived in Hell. During this reign of terror, her automobile was demolished by vandalism, windows in her mother's home were smashed, and she was repeatedly threatened with death. The architect of this scheme and it's sole perpetrator was her ex-husband. Finally, she received a death threat in the mail. Frantic, she went to the District Attorney. No inquiry was to be made, no charge was to be filed. No room for doggy cases she was told.

On January 14, 1980, as she sat in her friend's car preparing to go to her job, Geral Murrell was approached by her ex-husband. She had her 21-month-old baby in her lap. Mr. Murrell pulled her head through the passenger side window and began beating her with the pistol he was carrying. Wearying of this, he held her head fast against the roof and literally shot her brains out. The infant was still in her lap.

In its present posture, the allegations of the Petitioners below must be taken as true, under the Texas Rules of Civil Procedure. Under the present ruling of the Courts below, a prosecutor could selectively refuse to prosecute a rape case in which the victim was black, or a crime in which the victim was Baptist, or, as here, crimes in which the victims were women who had been in marital or quasi-marital relationships with the men who killed them. It is ironic that only after their deaths were they of note to the system designed to protect them. Apparently, the crime to which the prosecution excepts is murder - abuse is allowed. But, does this system allow such abuse by a prosecutor?

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT, I.E., WHETHER A PROSECUTOR'S DECISION NOT TO PROSECUTE FAMILY VIOLENCE CASES IS A CONSTITUTIONALLY PERMISSIBLE EXERCISE OF DISCRETION WHEN THAT DECISION IS BASED ON THE GENDER AND MARITAL STATUS OF THE VICTIM.

The Court below erred by adopting an all embracing interpretation of absolute pro-

secutorial immunity that conflicts with decisions of Federal Appellate Courts and the decision of this Court in Imbler v. Pachtman, 424 U.S. 409 (1976). The construction in the Court below insulates District Attorneys from damage actions under 42 U.S.C. §1983 when they purposely and willfully make out-of-court prosecutorial decisions based on constitutionally impermissible criteria.

The deaths of the Petitioners' decedents deprived them and their decedents of rights and privileges secured by the Constitution and Laws of the United States. In Imbler v. Pachtman, supra, this Court decided State Prosecutors have absolute immunity under 42 U.S.C. §1983 in regard to conduct during criminal trials. The Court left open the issue of what immunity, if any, existed in the non-judicial role of the prosecutor.

The Fifth Circuit in Marrero v. The City of Hialeah, 625 F.2d 499 (5th Cir. 1980), Cert. denied 67 U.S. 377, 101 S.Ct. 1353 (1981) gave prosecutors only "qualified immunity" from §1983 actions for money damages when they are performing functions outside of their courtroom role of prosecuting a case. It is important to note that in Marrero, supra, the defendant had

the benefit of a defense attorney, an impartial court, and others to review the actions of the District Attorney. In the instant case, the decision of the District Attorney was totally unreviewable.

Shortly after the Fifth Circuit of Appeals had decided the Marrero case, the Third Circuit Court of Appeals rendered its opinion in Mancini v. Lester, 630 F.2d 990 (3rd Cir. 1980). In that per curiam opinion, the Court followed the rationale set forth in Marrero. Mancini was a civil rights action, brought under 42 U.S.C. §1983, and in its reading and interpretation of Imbler, the Mancini Court ruled that the quality of the prosecutorial act involved in any given case would establish the kind of prosecutorial immunity that would be granted in that situation.

Other Federal Courts have applied a functional analysis to the immunity question and have granted prosecutors only qualified immunity, and only when there has been a finding that they acted in "good faith". Taylor v. Kavanagh, 640 F.2d 450 (2d Cir. 1981); Lee v. Willins, 716 F.2d 320 (2d Cir. 1980); Mancini v. Lester, supra; Hampton v. Hanrahan, 600 F.2d 600, 631-32 (7th Cir. 1979), rev'd in part on other grounds, per curiam, 446 U.S. 754 (1980);

D'Iorio v. County of Delaware, 447 F.Supp. 229 (E.D. Pa. 1978); Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977); Helstoski v. Goldstein, 552 F.2d 564 (3rd Cir. 1977); Tomko v. Lees, 416 F.Supp. 1137 (W.D. Pa. 1976); Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974); McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972); McCray v. Burrell, 622 F.2d 705 (4th Cir. 1980); Dodd v. Spokane County, 393 F.2d 330 (9th Cir. 1968); Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965).

As noted, Imbler v. Pachtman, supra, held that state prosecutors were absolutely immune from money damage suits under 42 U.S.C. §1983 in connection with the presentation of the State's case in criminal matters. The factual context of Imbler is significant. That case involved an allegation that the District Attorney had knowingly or negligently used false testimony to secure a murder conviction. The focus of the Court's opinion was the need to protect the District Attorney from damage actions of the sort that would undermine his performance in "deciding which suits to bring and in conducting them in court". Imbler, supra, at 424. The concern of the Imbler Court was directed at the possibility of criminal

defendants suing the District Attorney following an unsuccessful prosecution. The Court noted that such lawsuits would necessarily involve relitigation of the criminal trial. It was the Court's concern that the District Attorney, in his decision to prosecute specific individuals and in his decisions concerning what evidence to use at such trials remain free of concern with civil lawsuits.

Imbler was concerned with the spectre of individual criminal defendants seeking to relitigate their trials and impose liability upon prosecutors acting in their judicial role. If it had been a class of plaintiffs, would the Court have reached the same decision? Yet, even this distinction is not of particular moment, for the reason that Petitioners' decedents in the instant case are not those who have been criminally prosecuted or who have complaints to make of prosecutors acting in judicial roles. Rather, Petitioners' decedents are two among a class or group of women who are denied access to the criminal justice system and are harmed by this denial.

In Imbler the Court left open the issue of what immunity, if any, should be granted to prosecuting attorneys acting in their investigative and administrative capacities. As the Court noted, "drawing a proper line

between these functions may present difficult questions". Imbler, at 40, 424 U.S. 409, 430, f.n. 33. The Court re-emphasized that its decision applied only to the initiation and presentation of cases in court and noted that some actions by the District Attorney were preliminary to the initiation of prosecutions and were outside the courtroom. It was these preliminary actions outside the courtroom that posed "difficult questions". But note that throughout Imbler, the Court's reasoning speaks only to plaintiffs who have been prosecuted.

The instant case is thus distinguished from Imbler in several critical respects:

1. Petitioners are not disgruntled former defendants in criminal cases. The concern in Imbler in this regard is well worth noting again. If a prosecutor, using his best judgment under the stress of trial is also at risk in civil terms, the purpose of prosecution might well be blunted. The prosecutor must be free to prosecute those whom a Grand Jury indicts or those misdeamants named in informations. The notion of anything less than vigorous prosecution offends us all. Such is not the case at hand. In this case there is no chilling of the prosecutorial function. Further, holding for Petitioners in the case at bar

would not open the floodgates to relitigation of criminal cases by criminal defendants.

2. Petitioners are not challenging the District Attorney's method of prosecution, which was the focus of Imbler, but rather his systematic refusal to extend the protection of law to women who, on the basis of their marital status, were denied access to the criminal justice system. It is this discrimination that gives rise to the most striking difference between the instant case and the reported cases involving prosecutorial immunity. It is not an individual, but a class or group of women who are discriminated against on the basis of their sex and marital status.

3. Petitioners are not challenging the District Attorney's decision about prosecution on the basis of facts in individual cases; rather, they are attacking the District Attorney's practice and policy of refusing to exercise discretion in particular cases which results in an across-the-board policy or practice of not investigating or prosecuting on the basis of gender and marital status. As the Court pointed out in Oyler v. Boles, 368 U.S. 448, addressing the issue of selective prosecution of recidivists, although "the

conscientious exercise of some selectivity in enforcement is not in itself a federal constitutional violation", it might well be a violation of equal protection if "the selection was deliberately based upon a justifiable standard such as race, religion, or arbitrary classification". Oyler, supra. at 456. The instant case clearly involves a policy or practice deliberately based on such an unjustifiable standard, i.e., gender and marital status. If Petitioners' decedents in the instant case were all black, and only blacks were denied access, would the case seem more outrageous? If the basis of the discriminatory policy or practice alleged by Petitioners were religious rather then sex-related, would we be more offended?

4. Petitioners are not challenging decisions relating to the prosecution of cases in the courtroom, that is, decisions subject to judicial supervision. As Justice White noted in his concurring opinion in Imbler, the granting of absolute immunity for constitutional violations committed in the courtroom is justifiable because such violations occur during an integral part of the judicial process and they are detectable and correctable by opposing

counsel and by trial and appellate judges. That reasoning does not obtain in the case at hand. Constitutional violations committed outside the courtroom are not subject to review save and except through cases like this one. Constitutional violations committed outside the courtroom can otherwise be buried.

II. PETITIONERS' DECEDENTS HAD THE CONSTITUTIONALLY PROTECTED RIGHT NOT TO BE DEPRIVED OF LIFE ITSELF BY THE STATE WITHOUT DUE PROCESS OF LAW. AND, THEY HAD THE CONSTITUTIONALLY PROTECTED RIGHT, PURSUANT TO THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, NOT TO BE DISCRIMINATED AGAINST BY THE STATE BECAUSE OF THEIR MARITAL STATUS AND SEX.

The decedent women involved in this case had protected rights under the Fourteenth Amendment to the Constitution of the United States. It was their right that the state not deprive them of life without due process of law. It was their right under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States not to be invidiously discriminated

against by the state because of their sex, see, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 78 (1971); and marital status, see, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972). The decedent women had a constitutionally protected right that the state treat them in a rational and equal manner with respect to the enforcement of criminal law. See, Yick Wo v. Hopkins, 118 U.S. 356 (1886). They had a right that sounds in the Constitution of the United States, specifically in the First Amendment, that the state not bar access to the courts for redress of grievances. Those rights were denied the decedent women and resulted in their deaths.

The Petitioners alleged below that the Defendant District Attorneys intentionally and systematically, as a matter of policy and practice, refused to investigate or prosecute any husbands who inflicted injury on their wives or ex-wives. Specially, Petitioners alleged that each of the decedent women had approached the Office of the District Attorney of Tarrant County, Texas, seeking to file charges and enjoy the protection of law. That assistance and that right to the protection of law was denied them. The Petitioners have alleged

below the violation of rights secured by the Constitution and Laws of the United States, and 42 U.S.C. §1983, and those violations, for purposes of this appeal, must be taken as true. Wheeler v. White, 398 S.W.2d 93 (Tex. 1965); Dierlam v. Clear Lake Hospital, 593 S.W.2d 774 (Tex. Civ. App. - Houston [14th Dist.] 1979, no writ.).

The fact that a prosecutor has discretion to prosecute or not to prosecute individuals does not mean that a prosecutor has the power tc exercise that discretion by denying access to the courts to a class or group of persons, when that class or group discrimination is unrelated to valid prosecutorial concerns.

The case of Swain v. Alabama, 380 U.S. 202 (1965), involved peremptory challenges of jurors by the District Attorney, allegedly on the basis of race. In that case, the Court intimated that if the defendant could prove that blacks were systematically excluded from serving on any juries so as to deny blacks the same rights as whites, then a due process violation might well be found. The importance of that case is that it speaks to the limits of prosecutorial immunity. It speaks to the fundamental rights secured by 42 U.S.C. §1983 under the

Fourteenth Amendment. The clear intimation is that where discrimination based on unjustifiable standards is in question, immunity will not obtain and constitutional rights will be recognized.

Linda R. S. v. Richard D., 410 U.S. 614 (1973) was a case in which the Court held that the mother of an illegitimate child could not bring an injunctive action against the State District Attorney in Federal Court to prohibit him from declining criminal prosecution of putative fathers who fail to support their illegitimate children. In that case the state courts had construed the relevant criminal statute as not applying to fathers of illegitimate children. The Supreme Court held that the plaintiff had not made a sufficient showing of a nexus between her interest of child support and the enforcement of criminal law. However, it is important to note that the Court believed there was no nexus because enforcement of the criminal laws would merely put the putative father in jail and thus prosecution would not necessarily result in support payments. In the instant case, prosecution of the husband and ex-husband, and their resulting incarceration would have prevented the loss of life of Petitioners' decedents. Further, the

Supreme Court's denial of injunctive relief in Linda R. S. was clearly related to issues of federalism. The plaintiff was asking a federal court to enjoin a state official and, in effect, overturn a state court's interpretation of state law. Moreover, the plaintiff in Linda R. S. had other viable remedies to protect her interests. She could have sued the putative father for damages or asked the State Court for a declaratory judgment on the applicability of the criminal law to putative fathers. No such viable remedy existed for Petitioners' decedents in the instant case other than self-help.

Linda R. S. must also be read in conjunction with Martinez v. California, 100 S.Ct. 553 (1980). The United States Supreme Court in Martinez held that a suit for damages under 42 U.S.C. §1983 against a parole board, based on its release of a prisoner who killed a 15-year-old girl five months after release, did not allege deprivation of life within the meaning of the Fourteenth Amendment. In making this decision, however, the Court stressed that "the parole board was not aware that appellant's decedent, distinguished from the public at large, faced any special danger". The Court was thus making clear that had the

parole board had direct knowledge that the victim was a special target, it might well have had a duty to prevent harm from coming to her. In the instant case, Petitioners allege that the Defendant District Attorneys knew full well that the victims were special targets and needed protection from specific aggressors - their husband and ex-husband. It is important to note that the parole board makes the same kind of discretionary decisions as a District Attorney. Indeed, decisions of a parole board may be even more delicate and difficult to make than those of a District Attorney. Yet the Martinez Court left open the issue whether a parole board's decision to release a prisoner could result in the deprivation of a right secured by the Constitution.

In the instant case there is no basis for the Tarrant County District Attorneys' assertion that Petitioners' decedents had no constitutionally protected rights which were violated by the District Attorneys who, like the parole board, are state officials. From the right of equal protection to the right to life itself, these women were protected by the United States Constitution and the Laws of the United States.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Texas was served upon Frederick M. Schattman, Attorney for Tim Curry, at 200 West Belknap, Fort Worth, Texas 76102, and Cue Lipscomb, Attorney for Louis Barnett, 900 River Plaza Office Tower, 1701 River Run Road, Fort Worth, Texas 76107, by United States Mail, Certified, Return Receipt Requested, postage prepaid, on this 14th day of May, 1982.

PATRICK EMMETT CLARKE

APPENDIX

1. Plaintiffs' First Amended Petition
2. Judgment of the District Court
3. Judgment of the Court of Appeals
4. Opinion, Court of Appeals, Second Supreme Judicial District, Fort Worth, Texas
5. Motion for Rehearing
6. Order Denying Motion for Rehearing
7. Opinion, Court of Texas [illegible] Application for Writ of Error

NO. 17-62842-80

ALICE LOUISE MILLER, MALINDA WYNELL MILLER, and ROSALIE EVELYN MILLER, by and through their next friend, CHARLES A. MILLER, and GARZELL JASHAWN MURRELL, GERLYNDA JASHELL MURRELL, GETZELL DESHA MURRELL, and GANADRA DENA MURRELL, by and through their next friend, PAULINE GIVENS.

IN THE DISTRICT COURT

VS.

17TH JUDICIAL DISTRICT

TIM CURRY, individually and in his capacity as District Attorney of Tarrant County, THE CITY OF FORT WORTH, TEXAS, THE CITY OF FORT WORTH POLICE DEPARTMENT, H. F. HOPKINS, individually and in his capacity of Chief of Police of the Fort Worth Police Department, Fort Worth, Texas, OFFICERS DOE of the Fort Worth Police Department, HALTOM CITY, TEXAS, THE HALTOM CITY POLICE DEPARTMENT, FRANK BORTMUS, individually and in his capacity as Chief of Police of the Haltom City Police Department, and OFFICERS DOE of the Haltom City Police Department

TARRANT COUNTY, TEXAS

PLAINTIFFS' FIRST AMENDED PETITION

TO THE HONORABLE COURT:

Comes now ALICE LOUISE MILLER, MALINDA WYNELL MILLER, and ROSALIE EVELYN MILLER, minor children, by and through their next friend, CHARLES A. MILLER, and GARZELL JASHAWN MURRELL, GERLYNDA JASHELL MURRELL, GETZELL DESHA MURRELL, and GANADRA DENA MURRELL, minor children, by and through their next friend, PAULINE GIVENS, complaining of TIM CURRY, individually and in his capacity as the Tarrant County District Attorney, LOUIS BARNETT, individually and in his official capacity as Assistant District Attorney for Tarrant County, THE CITY OF FORT WORTH, TEXAS, THE CITY OF FORT WORTH POLICE DEPARTMENT, H. F. HOPKINS, individually and in his capacity as Chief of Police of the Fort Worth Police Department, OFFICERS DOE of the Fort Worth Police Department, HALTOM CITY, TEXAS, HALTOM CITY POLICE DEPARTMENT, FRANK BORTMUS, individually and in his capacity as Chief of Police of the Haltom City Police Department, and OFFICERS DOE of the Haltom City Police Department, and would show the Court and jury as follows:

I.

The wrongful acts complained of occurred in Tarrant County, Texas.

Defendant TIM CURRY, Tarrant County District Attorney, is the final policy-making employee of the District Attorney's Office with respect to decisions on the filing of criminal complaints by citizens in Tarrant County, Texas. TIM CURRY has already been served and answered in this cause.

Defendant LOUIS BARNETT was an Assistant District Attorney of Tarrant County, Texas, at all times herein mentioned and has already been served and answered in this cause.

Defendant CITY OF FORT WORTH, TEXAS is, and at all times herein mentioned was, an incorporated city of the State of Texas duly organized and chartered under the laws of the State. THE CITY OF FORT WORTH may be served by serving the Fort Worth City Attorney's Office, Municipal Building, 1000 Throckmorton, Fort Worth, Texas, 76102. Defendant FORT WORTH POLICE DEPARTMENT is a department of the City of Fort Worth and is responsible for the maintenance and enforcement of the laws and ordinances of the State of Texas, County of Tarrant, and City of Fort Worth within the city limits. Defendant FORT WORTH POLICE DEPARTMENT may be served by serving the Fort Worth City

Attorney's Office, Municipal Building, 1000 Throckmorton, Fort Worth, Texas 76102.

Defendant H. F. HOPKINS is the Chief of Fort Worth Police Department and as such is responsible for the establishment of the above-mentioned laws and insuring that the Defendant Police Officers enforce those laws in an equal and nondiscriminatory manner. Defendant H. F. HOPKINS is subject to service by serving him personally at the Fort Worth Police Department, 1000 Throckmorton, Fort Worth, Texas 76102.

The unknown Defendant POLICE OFFICERS DOE of the Fort Worth Police Department will be named and served as discovery yields their true names.

Defendant HALTOM CITY, TEXAS is, and at all times herein mentioned was, an incorporated city of the State of Texas duly organized and chartered under the laws of the state. HALTOM CITY may be served by serving the Haltom City Attorney's Office, 5024 Broadway Avenue, Haltom City, Texas 76117.

Defendant HALTOM CITY POLICE DEPARTMENT is a department of Haltom City and responsible for the maintenance and enforcement of the laws and ordinances of the State of Texas, County of Tarrant, and Haltom City

within the city limits. The HALTOM CITY POLICE DEPARTMENT may be served by serving Haltom City Attorney's Office, 5024 Broadway Avenue, Haltom City, Texas, 76117.

Defendant FRANK BORTMUS is the Chief of Haltom City's Police Department and as such is responsible for the establishment of policies and training procedures regulating the enforcement of the above-mentioned laws and insuring that the Defendant Police Officers enforce those laws in an equal and nondiscriminatory manner.

The unknown POLICE OFFICERS DOE of Haltom City Police Department will be named and served as discovery yields their true names.

II.

The Plaintiffs invoke the jurisdiction of this Court under 42 U.S.C. Section 1983, the Fourteenth Amendment to the Constitution of the United States of America, specifically as that Amendment sets forth the right to equal protection of law, and the First Amendment to the Constitution of the United States of America, specifically that part which guarantees the right to petition the government for redress of grievances. Case law has interpreted that right to

include the right of access to and the protection of the criminal justice system.

The acts of the Defendants as hereinafter related were done under color of state law.

The plaintiffs further allege that all acts of the Defendants, whether taken singularly or collectively, were done either intentional or maliciously, as hereinafter set forth.

III.

The Plaintiffs allege that all of the acts hereinafter described resulted in and were part of a pervasive pattern and practice on the part of the Defendant agencies and the individual Defendants that resulted in a denial to the deceased mothers of the Plaintiffs of the equal protection and assistance to which they were entitled under law. Plaintiffs allege that the denial of equal protection was based solely on the fact that the decedent parties were either married (MILLER) or because they appeared to be or had been married (MURRELL). Plaintiffs allege that such a pattern of activity or non-activity has not been extended to or inflicted upon unmarried or unrelated parties. The right to non-discriminatory protection of law is a fundamental right.

Further, Plaintiffs allege that the activity hereinafter set forth resulted in a denial only to abused wives, to which class the decedent women belonged. That denial of equal protection, by the Defendants, involved an impermissible sex-based classification that violated the strictures of 42 U.S.C., Section 1983, the Fourteenth Amendment, and the First Amendment. The policy of non-intervention and arrest-avoidance, as hereinafter described, lacks any rational relationship to the legitimate end of law enforcement. Further, that policy has a disproportionate impact on abused wives.

IV.

The Plaintiffs Miller Children are the surviving children of Mary Wynell Miller, deceased, who sustained fatal injuries by being shot to death by her husband on or about December 6, 1978. The shooting occurred in Haltom City, Tarrant County, Texas. The Miller Children are the sole surviving heirs of the said Mary Wynell Miller, inasmuch as their father, John W. Miller, killed himself immediately after shooting Mary Wynell Miller. Accordingly, the Miller Children are the sole and only necessary parties Plaintiff to this action. This suit is brought to recover damages

from the Defendants for violation of the Plaintiffs' rights and the rights of the deceased, Mary Wynell Miller, under the provisions of 42 U.S.C., Section 1983, the Fourteenth Amendment, and the First Amendment.

V.

Mary Wynell Miller and her husband separated in August, 1978. After initiating her divorce action on August 21, 1978, Mrs. Miller applied for and received extraordinary relief from the Court in which her divorce was filed, that Court being the 231st District Court of Tarrant County, Texas. In her affidavit for extraordinary relief, she alleged that her husband had a violent and ungovernable temper and was unpredictable. She alleged that her husband had abused her and harassed her and that she was in fear of him. The Court thereafter issued its temporary restraining order. Thereafter, the Court issued a temporary injunction forbidding her husband from performing certain acts, among them, communicating with decedent, going about any place she might be, or doing any act calculated to injure her. The full language of the temporary injunction is attached hereto in the temporary orders of the divorce case as Exhibit "A" to this

petition, and incorporated by reference herein as though fully set forth.

Immediately thereafter, Mrs. Miller's husband began to harass her, constantly threatening her life. Her husband on one occasion threatened her life at her place of employment within earshot and eyesight of at least three witnesses. On each such occasion, the deceased contacted the Defendant HALTOM CITY POLICE DEPARTMENT asking for enforcement of the Court order and/or for protection as a result of her husband's threats on the life of Mary Wynell Miller. On each occasion, the HALTOM CITY POLICE DEPARTMENT, by and through the officers that answered the calls of Mary Wynell Miller, refused to assist her or extend the protection of law to her, despite being informed that her husband had threatened to kill her. Plaintiffs allege that the Defendant HALTOM CITY POLICE DEPARTMENT in so acting violated its duty to the deceased under 42 U.S.C., Section 1983, the Fourteenth Amendment, and the First Amendment to the Constitution of the United States of America.

On one occasion, Mrs. Miller was approached by her husband within the municipal limits of the City of Fort Worth and threatened with death. She contacted the FORT WORTH

POLICE DEPARTMENT for assistance and protection. Despite being informed of the temporary injunction, and despite being told that her husband had threatened her life, the FORT WORTH POLICE DEPARTMENT refused to enforce the order or extend the protection of law to Mrs. Miller. In so acting, the Defendant CITY OF FORT WORTH, by and through its officers answering the call, violated the rights of the deceased under 42 U.S.C., Section 1983, the Fourteenth Amendment, and the First Amendment to the Constitution of the United States of America.

The policies and actions of the HALTOM CITY POLICE DEPARTMENT Officers were well known to the Defendant FRANK BORTMUS. He approved and supported that policy and practice in both his individual and official capacities.

Thereafter, Mrs. Miller personally visited the office of TIM CURRY, Tarrant County District Attorney, to seek the assistance of his office in securing some protection against her husband. Despite her personal visit and pleas for assistance, the Office of the District Attorney of Tarrant County, Texas, refused to take any action to assist her. In refusing to assist the deceased, Mary Wynell Miller,

the Office of the District Attorney was pursuing its longstanding policy of refusing to intervene in cases involving domestic violence. Evidence of that policy is set forth herein and is attached hereto as Exhibit "B" to this petition, and is incorporated by reference herein as though fully set forth. That refusal violated the rights of the deceased, Mary Wynell Miller, under 42 U.S.C., Section 1983, the Fourteenth Amendment, and the First Amendment of the Constitution of the United States of America. The Plaintiffs allege that the Defendant District Attorney, TIM CURRY, did not exercise his constitutionally permissible discretion in regard to Mary Wynell Miller. Rather, no discretion at all was exercised inasmuch as the refusal to in any way assist her was part of a pervasive pattern of sex-based discrimination and was the conscious result of a determination made by the Defendant, TIM CURRY. If any discretion at all was involved in his blanket decision to systematically refuse the protection of law to abused wives, this refusal included the deceased; it constituted an abuse of the discretion granted him and defined for him by the various decisions of the courts of the United States. The aforementioned

policy of refusal to intervene or extend equal protection of law to battered wives in cases involving domestic violence was an arbitrary, capricious, discriminatory and wholly unconstitutional policy that worked to deprive Plaintiffs and the Plaintiffs' decedent of equal protection of the law. As a proximate result of that policy, Mary Wynell Miller met her death.

On December 6, 1978, Mrs. Miller, while in her automobile with the minor Plaintiffs, was approached and threatened by her husband, John Miller. As she and one of the children fled from the car, her husband, John Miller, shot and killed her. Then and only then did authorities respond to the situation.

The Office of the District Attorney and the Defendant POLICE DEPARTMENTS represent the only means by which and through which the deceased Mary Wynell Miller could have exercised her right under the First Amendment to petition the government for redress of her grievances. Further, the actions of the Defendants, in regard to Mary Wynell Miller, violated the provisions of the Fourteenth Amendment and 42 U.S.C., Section 1983 in denying her right to equal protection of the law.

VI.

At the time of her death, Mary Wynell

Miller was 25 years of age with a long life expectancy under ordinary tables of mortality. She was a kind, affectionate and devoted mother, constantly interested in the welfare of her children. She was in excellent health physically, and worked hard and regularly, and devoted her earnings to the care, support and maintenance of her children and would have continued to do so. At the time of her death, she was earning $140.00 per week, and was well established in her occupation.

It is reasonably probable, had she not been killed, she would have earned at least a like amount of money for the rest of her natural life and it is reasonably probable that in fact such earnings would have increased over the years. During the remainder of her life, in all reasonable probability, she would have continued to aid and support her children, and to comfort, advise and counsel them. As a result of the wrongful acts of the Defendants, the Miller Children have been deprived of their mother, her support, her love and affection, guidance and maintenance, all of which they would have received but for her untimely and tragic death.

Plaintiffs Miller allege that the untimely death of their mother was proximately caused

by the wrongful acts of the Defendants and that the Plaintiffs have been damaged by the loss of support and maintenance from the decedent's earnings, and by their loss of her care, counsel, and advice, to the extent of EIGHT HUNDRED THOUSAND DOLLARS ($800,000).

VII.

For their gross, callous, and reckless disregard of the decedent's rights and the harm done to Plaintiffs, the Defendants should be held to pay punitive damages as provided for by law. Plaintiffs seek punitive damages in the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000).

VIII.

On or about December 21, 1979, the ex-husband of Geral Murrell instituted a course of terroristic threats and activities against her. Despite her many pleas for assistance from the Defendant FORT WORTH POLICE DEPARTMENT, and despite her reports of family violence toward her by her ex-husband, the Plaintiffs' decedent received no assistance from the FORT WORTH POLICE DEPARTMENT. In refusing to assist her, the Defendant FORT WORTH POLICE DEPARTMENT was following its policy of non-intervention in situations involving domestic violence.

That policy and practice was well known to the Defendant H. F. HOPKINS, the Chief of the Fort Worth Police Department. He approved that practice both individually and in his official capacity. The Fort Worth Police Department's OFFICERS DOE, in responding to the decedent's calls, were following that policy when they took only reports and took no further action. In so acting, the Defendant FORT WORTH POLICE DEPARTMENT and its OFFICERS DOE violated the rights of the Plaintiffs' decedent, Geral Murrell, under the provisions of 42 U.S.C., Section 1983, the Fourteenth Amendment to the Constitution of the United States, insofar as it provides for equal protection of law, and the First Amendment of the Constitution of the United States, insofar as it guarantees the right of individual citizens to petition the government for redress of grievances.

IX.

Approximately ten days before being killed, Mrs. Murrell's car was vandalized by her ex-husband, Getzel Murrell. Once again, Mrs. Murrell contacted the Defendant FORT WORTH POLICE DEPARTMENT asking for assistance. Again, no assistance was given to her and no arrest was made despite her complaint.

Shortly after destroying Mrs. Murrell's car, Mrs. Murrell's ex-husband destroyed a picture window at the home of Pauline Givens, Mrs. Murrell's mother. Mrs. Givens called the police. A report of violence was made. Again, despite the complaint of Pauline Givens, and despite the report of violence, no arrest was made and no arrest was forthcoming.

Approximately eight days before Mrs. Murrell was killed, her ex-husband went to the home of Pauline Givens where Mrs. Murrell was in hiding and threatened everyone in the home with death. Mrs. Givens called the FORT WORTH POLICE DEPARTMENT and spoke with a female dispatcher. She was, on that occasion, informed by the police dispatcher that the Defendant FORT WORTH POLICE DEPARTMENT was too busy to respond and told to take care of herself. The entire family fled the Givens residence that night. Early the next morning, Geral Murrell called the police. Again, a report was made. And again, no arrest was made and no arrest was forthcoming.

Approximately a week before Mrs. Murrell was killed, her ex-husband heaved a brick through the bedroom window of Mrs. Givens' home, where Mrs. Murrell was in hiding. Again, the Defendant FORT WORTH POLICE

DEPARTMENT was called. Again a report was made. Once again no arrest was made and no arrest was forthcoming.

The next day, approximately six days before the death of Geral Murrell, a death threat was received in the mail at the home of Pauline Givens. A copy was furnished to the Defendant FORT WORTH POLICE DEPARTMENT. Once again the FORT WORTH POLICE DEPARTMENT, by and through one of its OFFICERS DOE, informed the Plaintiffs' decedent that it could do nothing inasmuch as the death threat had been made through the mail. Thereupon, Geral Murrell and her mother, Pauline Givens, went to the Office of the Tarrant County District Attorney and spoke with MR. LOUIS BARNETT, the Defendant, an Assistant District Attorney for Tarrant County, Texas. The Defendant BARNETT advised Geral Murrell in the presence of Pauline Givens that it was indeed a shame but that nothing could be done or would be done by the Office of the Defendant Tarrant County District Attorney. In so acting, the Defendant BARNETT violated the rights of the deceased to equal protection of the law under the Fourteenth Amendment of the Constitution of the United States of America, violated the deceased's right to petition the government for redress of a

grievance under the First Amendment of the Constitution of the United States of America, and violated the rights of the deceased pursuant to 42 U.S.C., Section 1983. In so acting, Defendant BARNETT either followed an official policy of the District Attorney's Office or individually abused the Office by denying Mrs. Murrell her rights.

On January 14, 1980 Mrs. Murrell was proceeding on her way to work. As she entered her automobile, her ex-husband approached it. Mrs. Murrell had her 21-month-old baby on her lap. When her ex-husband approached the vehicle he beat her unconscious although she held the child in her lap. Her ex-husband then shot her in the head even as she held the child. The action or inaction of the Defendants in regard to the Murrell Children's mother constituted a policy of inaction that was and is a proximate cause of the death of Mrs. Murrell. That policy of non-intervention in disputes involving domestic violence was one that violated the civil rights and the human rights of the deceased and the Plaintiffs in the instant suit, inasumch as it violated the rights of the deceased and the Plaintiffs pursuant to the Fourteenth Amendment, the First Amendment, and 42 U.S.C. Section 1983.

X.

At the time of her death, Mrs. Murrell was 23 years of age with a long life expectancy under ordinary tables of mortality. She was a kind, affectionate and devoted mother, constantly interested in the welfare of her children. She was in excellent health physically, worked hard and regularly, and devoted her earnings to the care, support and maintenance of her children and would have continued to do so. At the time of her death, she was earning $150.00 per week, and was well established in her occupation. It is reasonably probable that had she not been killed, she would have earned at least a like amount of money for the rest of her natural life and it is reasonably probable that in fact such earnings would have increased over the years. During the remainder of her life, in all reasonable probability, she would have continued to aid and support her children, and to comfort, advise and counsel them. As a result of the wrongful acts of the Defendants, the Murrell Children have been deprived of their mother, her support, her love and affection, guidance and maintenance, all of which they would have received but for

her untimely and tragic death.

Plaintiffs Murrell Children allege that the untimely death of their mother was proximately caused by the wrongful acts of the Defendants, and that Plaintiffs have been damaged by the loss of support and maintenance from their mother's earnings, and by the loss of her care, counsel, and advice, to the extent of EIGHT HUNDRED THOUSAND DOLLARS ($800,000), for which they herein seek recovery.

XI.

For their gross, callous, and reckless disregard of the decedent's rights and harm done to Plaintiffs, the Defendants should be held to pay punitive damages as provided by law. Plaintiffs seek punitive damages in the amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS ($1,500,000).

XII.

As a result of the harm done them, and to perfect their rights under law, the Miller Children and the Murrell Children, by and through their next friends retained SISTER SEAN O'REILLY, STEVEN W. YOUNG, BRENDA KAY CORNISH, and JOE JAMES SAWYER as attorneys to represent them in this cause. SISTER SEAN O'REILLY, STEVEN W. YOUNG, and BRENDA KAY CORNISH are attorneys for West Texas Legal Services. Attorney

JOE JAMES SAWYER is a private attorney licensed to practice law in the State of Texas. For legal services in representing them in this cause Plaintiffs seek recovery of reasonable attorney's fees pursuant to 42 U.S.C., Section 1983. Plaintiffs allege that a reasonable attorney's fee for representation and trial of this cause would be SIX HUNDRED THOUSAND DOLLARS ($600,000). For appeal of this cause to the Court of Civil Appeals, Plaintiffs seek an additional FIFTEEN THOUSAND DOLLARS ($15,000) as a reasonable attorney's fee. For appeal of this cause to the Texas Supreme Court, Plaintiffs seek an additional TEN THOUSAND DOLLARS ($10,000) as attorney's fees. For appeal of this cause to the Supreme Court of the United States, Plaintiffs seek an additional TWENTY-FIVE THOUSAND DOLLARS ($25,000) as attorney's fees.

P R A Y E R

WHEREFORE, PREMISES CONSIDERED, the Plaintiffs pray that the Defendants be cited to appear and answer herein as provided by law. Upon trial of this cause, the Miller Children pray that they recover the sum of $8,000,000 as actual damages from Defendants, jointly and severally, for $1,500,000 from Defendants as punitive damages, jointly and severally, and for reasonable attorney's fees, for costs of

court, and for such other and further relief to which they may show themselves justly entitled, at law or in equity; the Murrell Children pray that upon trial herein they recover the sum of $800,000 as actual damages from the defendants, jointly and severally, $1,500,000 from the Defendants as punitive damages, jointly and severally, and for such other and further relief to which they may show themselves justly entitled, at law or in equity.

Respectfully submitted,

JOE JAMES SAWYER
Attorney for Plaintiffs
110 W. 7th St.
Fort Worth, Texas 76102
(817) 338-1669

SISTER SEAN O'REILLY
Attorney for Plaintiffs

STEVEN W. YOUNG
Attorney for Plaintiffs

BRENDA KAY CORNISH
Attorney for Plaintiffs
West Texas Legal Services
100 Main St.
Lawyers Building
Fort Worth, Texas 76102
(817) 336-3943

CERTIFICATE OF SERVICE

I hereby certify that I have on this 4th day of December, 1980 served a true and correct copy of the foregoing Plaintiff's First Amended Petition upon each attorney of record of the Defendants Tim Curry and Louis Barnett in this proceeding by placing a true and correct copy thereof in the United States Postal Service, properly addressed, postage pre-paid, via Certified Mail, Return Receipt Requested. Said copies were mailed to the following attorneys:

MARVIN COLLINS, Assistant
District Attorney
Certified Mail #0299681

WILLIAM H. BRIGHAM, Assistant
District Attorney
Certified Mail #0299682

FREDERICK M. SCHATTMAN, Assistant
District Attorney
Certified Mail #0299683

TOM MYERS, Assistant District
Attorney
Certified Mail #0299684

200 West Belknap
Fort Worth, Texas 76102
ATTORNEYS FOR DEFENDANT TIM CURRY

CUE LIPSCOMB
Lipscomb, Zachry,& Kearney
One Tandy Center, Suite 606
Fort Worth, Texas 76102
ATTORNEY FOR DEFENDANT LOUIS BARNETT
Certified Mail #0299685

STEVEN W. YOUNG
Attorney for Plaintiffs

NO. 231-94933

IN THE MATTER OF THE MARRIAGE OF

MARY WYNELL MILLER AND JOHN WILLIAM MILLER

AND IN THE INTEREST OF: ALICE LOUISE MILLER, MALINDA WYNELL MILLER and ROSALIE EVELYN MILLER, CHILDREN

IN THE DISTRICT COURT

231ST JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

TEMPORARY ORDERS

On the 30th day of August, 1978, came on to be heard the application of Petitioner for temporary orders.

Petitioner, MARY WYNELL MILLER, appeared in person and by attorney and announced ready.

Respondent, JOHN WILLIAM MILLER, although duly and properly notified, did not appear.

The Court, having considered the pleadings and heard the evidence and argument of counsel, finds that all necessary prerequisites of the law have been legally satisfied and that this Court has jurisdiction over the parties and subject matter of this cause.

The Court finds that the following orders for the safety and welfare of the children are in the best interest of the children.

IT IS ORDERED that MARY WYNELL MILLER be and is hereby appointed Temporary Managing Conservator of the following children:

ALICE LOUISE MILLER, MALINDA WYNELL MILLER and ROSALIE EVELYN MILLER.

IT IS ORDERED that the Temporary Managing Conservator shall have all the rights, privileges, duties, and powers of a parent, to the exclusion of the other parent, subject to the rights, privileges, duties, and powers granted to any temporary possessory conservator named in this order.

EXHIBIT A
PAGE 1 OF 4 PAGES

IT IS ORDERED that JOHN WILLIAM MILLER be and is hereby appointed Temporary Possessory Conservator of the following children: ALICE LOUISE MILLER, MALINDA WYNELL MILLER and ROSALIE EVELYN MILLER.

IT IS ORDERED that the Temporary Possessory Conservator shall have visitation with the children at the discretion of the Temporary Managing Conservator as follows:

> On alternate Sundays from 10:00 A.M. until 4:00 P.M. with the first such visitation period to commence on Sunday, September 3, 1978, and continuing for a like period of time on alternate Sundays thereafter at the discretion of the Temporary Managing Conservator, and if the Temporary Possessory Conservator is not violent or drinking alcoholic beverages.

IT IS ORDERED that the Temporary Possessory Conservator shall return the children to the Temporary Managing Conservator immediately

following each period of possession.

IT IS ORDERED that the Temporary Managing Conservator shall surrender the children at her discretion to the Temporary Possessory Conservator at the beginning of each period of possession.

IT IS ORDERED that the Temporary Possessory Conservator shall have the following rights, privileges, duties, and powers during the period of possession:

The duty of care, control, protection, and reasonable discipline of the children;

The duty to provide the children with clothing, food, and shelter; and

The power to consent to medical and surgical treatment during an emergency involving an immediate danger to the health and safety of the children.

IT IS ORDERED that JOHN WILLIAM MILLER pay to MARY WYNELL MILLER for support of ALICE LOUISE MILLER, MALINDA WYNELL MILLER and ROSALIE EVELYN MILLER the sum of $60.00 per week, with the first payment being due and payable on the 8th day of September, 1978, and a like payment being due and payable on Friday thereafter until further order of this Court.

All said payments are to be made through the Tarrant County Child Support Office

The Court finds that the following orders respecting the property and parties are necessary and equitable.

IT IS ORDERED that Petitioner have the exclusive use and possession of the following property during the pendency of this suit:

1. The residence located at 4712 Bernice, Fort Worth, Texas.

2. The furniture and furnishings.

3. The 1967 Buick automobile.

IT IS ORDERED that Respondent have the exclusive use and possession of the personal property in Respondent's possession during the pendency of this suit.

The Court finds that immediate and irreparable injury, loss, or damage will result to Petitioner unless the temporary injunction set forth herein is granted and that Petitioner has no adequate remedy at law. The requirement of a bond is hereby dispensed with.

The temporary injunction granted below shall be effective immediately and shall be binding on Respondent, on Respondent's agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise.

IT IS ORDERED that Respondent is enjoined from:

1. Harming, destroying, or wasting any property belonging to Petitioner or to Respondent.

2. Hiding or concealing any property belonging to Petitioner or to Respondent.

3. Communicating with Petitioner by writing, by telephone, by telegraph, by oral conversation, in person, or in any other manner, except in reasonable pursuance of conservatorship rights as ordered herein.

4. Going about Petitioner or Petitioner's place of residence, Petitioner's place of employment, or any other place where Petitioner may be.

5. Doing any act calculated to embarrass, harass, molest, injure, or humiliate Petitioner.

EXHIBIT A
PAGE 3 OF 4 PAGES

6. Hurting, harming, assaulting, or in any manner causing physical injury to Petitioner's person.

7. Hurting, harming, assaulting, or in any manner causing physical injury to the children's persons.

8. Interfering in any way with Petitioner's possession of the minor children by taking or attempting to take possession of the children, directly or through any other person, from the residence, school, or any other place, except

in reasonable pursuance of conservatorship rights as ordered herein.

9. Occupying, entering upon, coming about, or interfering in any other way with Petitioner's exclusive possession and use of the residence at 4712 Bernice, Fort Worth, Texas, with the property located therein or used in connection therewith, and with the 1967 Buick automobile.

All said temporary orders shall continue in force during the pendency of this suit or until further order of this Court.

SIGNED this 7th day of Sept., 1978.

JOE SPURLOCK II
JUDGE PRESIDING

APPROVED:

CARLA CRISFORD
Attorney for Petitioner
West Texas Legal Services
406 W. T. Waggoner Building
Fort Worth, Texas 76102
(817) 334-1435

EXHIBIT A
PAGE 4 OF 4 PAGES

NO. 17-62842-80

ALICE LOUISE MILLER, MALINDA WYNELL MILLER, and ROSALIE EVELYN MILLER, by and through their next friend, CHARLES A. MILLER, and GARZELL JASHAWN MURRELL, GERLYNDA JASHELL MURRELL, GETZELL DESHA MURRELL, and GANADRA DENA MURRELL, by and through their next friend, PAULINE GIVENS

IN THE DISTRICT COURT

vs.

17TH JUDICIAL DISTRICT

TIM CURRY, individually and in his capacity as District Attorney of Tarrant County, LOUIS BARNETT, individually and in his capacity as Assistant District Attorney of Tarrant County, THE CITY OF FORT WORTH, TEXAS, THE CITY OF FORT WORTH POLICE DEPARTMENT, H. F. HOPKINS, individually and in his capacity as Chief of Police of the Fort Worth Police Department, Fort Worth, Texas, OFFICERS DOE of the Fort Worth Police Department, HALTOM CITY, TEXAS THE HALTOM CITY POLICE DEPARTMENT, FRANK BORTMUS, individually and in his capacity as Chief of Police of the Haltom City Police Department, and OFFICERS DOE of the Haltom City Police Department

TARRANT COUNTY, TEXAS

A F F I D A V I T

COMES NOW, BARBARA JOHNSON, and states

under oath as follows:

"My name is BARBARA JOHNSON. On September 22, 1978, I was employed by the Fort Worth Star Telegram as a reporter-writer. The quote included in the story attached hereto and set forth below was accurate and was made to me in a telephone interview with the District Attorney, Tim Curry:

> "Look," Curry said, "I'm not going to clutter the system with doggie lawsuits when we've got good ones to try...."

Further Affiant sayeth not.

BARBARA JOHNSON, Affiant

EXHIBIT B
PAGE 1 OF 4 PAGES

BEFORE ME, the undersigned authority, on this day personally appeared BARBARA JOHNSON, known to me to be the person who signed the foregoing affidavit and who, upon her oath, stated the foregoing statement is true and correct.

SUBSCRIBED AND SWORN TO me this 4th day of December, 1980.

LESLIE KAUITZSCH
NOTARY PUBLIC IN AND FOR
TARRANT COUNTY, TEXAS

My commission expires:
4/4/84
EXHIBIT B
PAGE 2 OF 4 PAGES

Attached at this point is a front page from the Fort Worth Star-Telegram, Friday Evening Edition, dated September 22, 1978, with the lead headline as follows:

"PLEAS IGNORED: WOMAN DIES

Written by Barbara Johnson, Star-Telegram Writer.

EXHIBIT B
PAGE 3 OF 4 PAGES

and the second page of the same edition of the Fort Worth Star-Telegram continuing the story from the front page with the caption as follows:
"PLEAS FOR HELP UNANSWERED".

EXHIBIT B
PAGE 4 OF 4 PAGES

NO. 17-62842-80

ALICE LOUISE MILLER, MALINDA WYNELL MKLLER, and ROSALIE EVELYN MILLER, by and through their next friend, CHARLES A. MILLER, and GARZELL JASHAWN MURRELL, GERLYNDA JASHELL MURRELL, GETZELL DESHA MURRELL, and GANADRA DENA MURRELL, and through their next friend, PAULINE GIVENS,

IN THE DISTRICT COURT

V.

17TH JUDICIAL DISTRICT

TIM CURRY, individually and in his capacity as District Attorney of Tarrant County, LOUIS BARNETT, individually and in his capacity as Assistant District Attorney of Tarrant County,

TARRANT COUNTY, TEXAS

JUDGMENT

On the 16th day of January, 1981, and upon the 19th day of January, 1981, and upon the 2nd day of February, 1981, came on to be heard in the above entitled and numbered cause wherein ALICE LOUISE MILLER, MALINDA WYNELL MILLER, and ROSALIE EVELYN MILLER, by and through their next friend, CHARLES A. MILLER, and GARZELL JASHAWN MURRELL, GERLYNDA JASHELL MURRELL, GETZELL DESHA MURRELL, and GANADRA DENA MURRELL, by and through their next friend, PAULINE GIVENS

are Plaintiffs and TIM CURRY, individually and in his capacity as District Attorney of Tarrant County, LOUIS BARNETT, individually and in his capacity as Assistant District Attorney of Tarrant County, are Defendants, the Motion to Dismiss of the Defendants' and the Defendants' Motions for Award of Costs and Legal Fees. Plaintiffs and Defendants appeared by and through their attorneys of record and announced ready. The Court, having considered the pleadings, the evidence and argument of counsel thereon, finds that the Motion to Dismiss is well taken and should be GRANTED.

IT IS THEREFORE, ORDERED ADJUDGED and DECREED, that this action be, and the same is hereby DISMISSED WITHOUT PREJUDICE.

The Court, being of the opinion that this action was not commenced or pursued for the sole purpose of harassment of the Defendants and that Plaintiffs and their attorneys have not maliciously abused the legal process, finds that the Motion for Award of Costs and Legal Fees is not well taken and it is therefore DENIED.

All costs herein are taxed against the Plaintiffs, for which let execution issue if not timely paid.

SIGNED this the 20 day of March, 1981.

CHARLES J. MURRAY
Judge, 17th District Court
Tarrant County, Texas

COURT OF APPEALS

SECOND SUPREME JUDICIAL DISTRICT

Fort Worth, Texas
November 25, 1981

West Texas Legal Services
100 Main St., Lawyers Bldg.
Fort Worth, TX 76102
336-3943

Dear Sir:

The Judgment of the Trial Court in case of ALICE LOUISE MILLER, ET AL vs. TIM CURRY, D.A., TARRANT COUNTY, ET AL. No. 18586 from Tarrant County, was affirmed today. Copies of the opinion and judgment of the Court are hereto attached.

Yours truly,

Yvonne Palmer, Clerk

YP/mfm

JUDGMENT

Alice Louise Miller, et al.
18586 vs.
Tim Curry, District Attorney,
Tarrant County, et al.

From the District Court of Tarrant County (17-62842-80) November 25, 1981

Opinion by Justice Jordan

This cause came on to be heard on the transcript of the record and the same having been reviewed it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court in this cause be and it is hereby affirmed.

NO. 18586

IN THE COURT OF APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

ALICE LOUISE MILLER, ET AL APPELLANTS

VS.

TIM CURRY, DISTRICT ATTORNEY,
TARRANT COUNTY, ET AL APPELLEES

FROM THE DISTRICT COURT OF TARRANT COUNTY

OPINION

Appellants originally sued Tim Curry, District Attorney for Tarrant County, Texas, and Louis Barnett, an Assistant District Attorney for Tarrant County, Texas, in their official capacities for damages alleged as a result of violation by the defendants of the plaintiff's civil rights under 42 U.S.C.A. §1983, the Fourteenth Amendment to the Constitution of the United States, and the Texas Wrongful Death Statute, TEX. REV. CIV. STAT. ANN. art. 4671, et seq. (1952). By six special exceptions defendants contended that plaintiffs had failed to state any

cause of action for violation of their civil rights under either 42 U.S.C.A. §1983 or the Texas Wrongful Death Statute. The trial court sustained all six special exceptions and gave plaintiffs thirty days to amend their pleadings.

Within the thirty days plaintiffs amended their petition, suing both Curry and Barnett in their individual capacities as well as official capacities, for damages for violation of their civil rights under 42 U.S.C.A. §1983, and the First and Fourteenth Amendments to the Constitution of the United States. This petition added as parties defendant the Cities of Fort Worth and Haltom City, the police departments of both cities, the police chiefs of both cities, and unnamed individual police officers of both cities. In this petition plaintiffs dropped their previously asserted action under the Texas Wrongful Death Statute.

Thereafter, the trial court severed the cause of action against Curry and Barnett and again sustained defendant's two special exceptions to the asserted cause of action under Federal Law, and dismissed the case on the ground that plaintiffs had failed to state a cause

of action. This appeal followed.

The appellants here are surviving children of Mary Wynell Miller, deceased, and Geral Murrell, deceased, and the suit was maintained by a relative of each deceased woman as the next friend of the minor children of each deceased woman. Both women were shot to death, Mrs. Miller by her husband after she had filed suit for divorce, and Mrs. Murrell by her former husband, after weeks and months of being threatened, terrorized, and abused. Before their deaths, both women had visited the office of the district attorney, seeking protection in some unspecified form from the violent and threatening acts of the husband and former husband. Appellants' amended petition did not specify the assistance sought from the office of the district attorney but simply alleged that each woman sought protection against the husband and former husband and that in each instance such assistance was refused.

Appellants alleged that the refusal of assistance for each woman was the result of a planned, arbitrary, and capricious office policy which unconstitutionally deprived these women and appellants of their constitutional rights and equal

protection of the law. It was alleged that both women were killed because the district attorney failed and refused to protect them. It was also alleged that in both cases the refusal of the district attorney to protect them violated the women's rights under 42 U.S.C.A. §1983, to equal protection of the law under the Fourteenth Amendment, and to petition the government for redress of a grievance under the First Amendment. However, appellant's brief only urges denial of rights under 42 U.S.C.A. §1983.

On appeal appellant raises two points of error: 1, that the trial court erred in dismissing appellant's cause of action because appellants do have a protected right under 42 U.S.C.A. §1983, and 2, that the trial court erred in dismissing the case against the appellees for failure to state a cause of action because there is no absolute prosecutorial immunity.

Since the case was dismissed by the trial court on the pleadings because appellants failed to state a cause of action, it is necessary that this court assume that all material factual allegations are true. Wheeler v. White, 398 S.W.2d 93, (Tex. 1965). We therefore assume, for purpose of this appeal only, that there

was, during the time in question, a policy in the Tarrant County district attorney's office to invariably and consistently fail and refuse to prosecute cases of physical abuse or violence done to women, and particularly, as appellants claim, to "battered wives".

Our discussion will center on appellant's second point of error, that the trial court erred in dismissing the cause of action because there is no absolute prosecutorial immunity. This is the central issue, because even if there was a cause of action alleged in appellant's amended petition under 42 U.S.C.A. §1983, for violation of civil rights, it would fail if, as appellees contend, state prosecutors are absolutely immune from civil liability for damages under 42 U.S.C.A. §1983 for the initiation and prosecution of criminal cases.

There has long been a common law immunity for prosecutors from civil actions for malicious prosecution based on an indictment and prosecution which results in an acquittal of the accused. The first American case to address the question of a prosecutor's amenability to such action was Griffith v. Slinkard, 146 Ind. 117, 44 N.E. 1001, 1896. The

complaint there was that a local prosecutor, without probable cause, and with malice, added the plaintiff's name to a grand jury true bill after the grand jurors had refused to indict him. The Supreme Court of Indiana dismissed the action on the ground that the prosecutor was absolutely immune. The Supreme Court of the United States reached the same result in a similar case against a special assistant to the Attorney General of the United States for maliciously and without probable cause procuring plaintiff's grand jury indictment by the willful introduction of false and misleading evidence. It was held that the immunity is absolute and is grounded on principles of public policy. Yaselli v. Goff, 275 U.S. 503.

The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concerns that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising

the independence of judgment required by his public trust.

The same considerations of public policy that dictate the common-law rule also mandate and require absolute immunity under 42 U.S.C.A. §1983. Imbler v. Pachtman, 424 U.S. 409. In this case the court held that a state prosecutor who acted within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the state's case was absolutely immune from a civil suit for damages for alleged deprivations of the defendant's constitutional rights under 42 U.S.C.A. §1983. Moreover, the court held that such absolute immunity from liability pertained even where the prosecutor knowingly used perjured testimony, deliberately withheld exculpatory information or failed to make full disclosure of all facts casting doubt upon the state's testimony.

The Supreme Court in Imbler, supra, reasoned that if a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties to at least the same extent that the threat of common-law suits for malicious prosecution would. The court said: "A prosecutor is duty bound to

exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate... . Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." Id. at 424, 425.

The rule of absolute immunity for prosecutors officially engaged in their duties of initiating and prosecuting criminal complaints has prevailed in the Federal Courts before and since the ruling by the Supreme Court in Imbler, supra. See Turack v. Guido, 464 F.2d 535 (3rd Cir. 1972); Sykes v. State of California (Dept. of Motor Vehicles), 497 F.2d 197, (9th Cir. 1974); Prince v. Wallace, 568 F.2d 1176 (5th Cir. 1978);

Henzel v. Gerstein, 608 F.2d 654 (5th Cir. 1979); Cook v. Houston Post, 616 F.2d 791 (5th Cir. 1980).

In Robichaud v. Ronan, 351 F.2d 533, (9th Cir. 1965(, it was said that the key to immunity as a prosecutor is whether "the acts, alleged to have been wrongful, were committed by the officer in the performance of an integral part of the judicial process." In Sykes, supra, the test for determining whether the questioned acts of the prosecutor are within the sphere of his official duties and are thus immune from civil liability is well articulated. "Typical situations wherein quasi-judicial immunity exists, regardless of the existence of malice, include the filing of criminal complaints, the institution of proceedings for the arrest or search of persons suspected of criminal activities, the drawing of indictments and informations, and similar intrinsically prosecutorial functions." Id.at 200

In applying this well established and clearly defined law of absolute immunity for prosecutors engaged in their official capacities, as stated in Robichaud, supra, and Sykes, supra, as well as Imbler, supra, and other cases cited herein, we have no difficulty in holding that the veteran

trial judge in this case did not err in dismissing appellant's cause of action.

While appellants complain of the district attorney's inaction, or failure to perform his official duties, instead of overt action in prosecuting, which was the basis for the suits against the prosecutors in all of the cases cited herein, we see no distinction. The same reasons of public policy for prosecutorial immunity prevail. As was said in Imbler, supra, the threat of §1983 suits would undermine performance of the prosecutor's duties. If the prosecutor in this case had to look over his shoulder in fear of potential personal liability every time he refused to file, investigate, and prosecute criminal charges, his effectiveness as an independent public official would be drastically curtailed and impaired. He would, in this event, be constrained to file all manner of groundless criminal complaints which he ordinarily, in the exercise of sound discretion, would refuse to pursue. Also, if the prosecutor were not immune, in this instance, suits for civil damages could be expected with considerable frequency from disgruntled, frustrated citizens whose complaints and grievances

the prosecutor, in exercising his best judgment, chose not to file and prosecute. His time, energies and resources would be seriously affected.

For the reasons stated, appellant's second point of error is overruled.

With respect to appellant's first point of error, that it was error for the trial court to dismiss their cause of action because they did assert rights protected under 42 U.S.C.A. §1983, this point also is overruled. Even assuming the truth of the allegations therein contained, we find that the appellant's amended petition failed to state a cause of action under §1983. The petition contained many broad conclusions, all of which, even if true, taken together did not present actionable rights of appellants which were violated by these two appellees. Moreover, regardless of our holding on appellant's first point of error, and even if the pleadings did state a cause of action, it would not be maintainable against these appellees for the reasons discussed under the second point of error.

The judgment of dismissal of the trial court is affirmed.

WALTER E. JORDAN,
JUSTICE

HUGHES, JORDAN, and BROWN, JJ.

Nov 25 1981

NO. 18586

IN THE COURT OF APPEALS FOR THE

SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

ALICE LOUISE MILLER, ET AL APPELLANTS

VS.

TIM CURRY, DISTRICT ATTORNEY,
TARRANT COUNTY, ET AL. APPELLEES

****

MOTION FOR REHEARING

TO THE HONORABLE COURT:

ALICE LOUISE MILLER, ET AL., Appellants in this cause, make this Motion for Rehearing of the decision of the Court rendered on November 25, 1981, and would show unto the Court the following:

I.

1. Point of Error: The Court of Civil Appeals erred in affirming the trial court's judgment in dismissing Appellants cause of action against the Appellees for failure to state a cause of action because Appellants do have a protected right under 42 U.S.C. §1983.

2. Argument and Authorities: Case law indicates that Appellants have presented an

actionable right pursuant to 42 U.S.C. §1983. In Linda R. S. v. Richard D., 410 U.S. 614 (1973), the Supreme Court held that the Plaintiff, Linda R. S., had not made a sufficient showing of a nexus between her interest of child support and the enforcement of criminal law. In the instant case, prosecution of the husbands and their resulting incarceration would have prevented the loss of life of Appellant's decedents. In Martinez v. California, 100 S.Ct. 553 (1980), the Supreme Court made it clear that, had the parole board had direct knowledge that the victim was a special target, it might well have had a duty to prevent harm from coming to her. There is no doubt that the Appellant's decedents herein were special targets known to the Appellees.

II.

1. Point of Error: The Court of Civil Appeals failed to distinguish the facts of this case from Imbler v. Pachtman, 424 U.S. 409 (1976). The Court of Civil Appeals has further ignored the narrowing of the Rule of Absolute Immunities of Prosecutors by the Federal Courts since Imbler v. Pachtman, supra, wherein the Courts have applied a functional analysis test, raised the nature of the act engaged

in by the prosecutor issue, and looked at the consequent harm involved in determining whether to apply the Rule of Absolute Immunity to Prosecutors engaged in their official capacities. In Owen v. The City of Independence, 100 S.Ct. 1398 (1980), the Supreme Court denied good faith immunity to municipalities.

WHEREFORE, Appellants request that the Court grant this motion and that the judgment of the trial court be reversed.

Respectfully submitted,
WEST TEXAS LEGAL SERVICES
Lawyers Building
100 Main Street
Fort Worth, Texas 76102
(817) 336-3943

By: PATRICK EMMETT CLARKE
State Bar Identification
Number 04317000

JOE JAMES SAWYER
State Bar Identification
Number

ATTORNEYS FOR APPELLANTS

VERIFICATION

THE STATE OF TEXAS §

COUNTY OF TARRANT §

BEFORE ME, the undersigned Notary Public, on this day personally appeared PATRICK EMMETT CLARKE, who, being by me duly sworn on his oath deposed and said that he is the attorney of record for the Appellants in the above-entitled and numbered cause; that he has read the above and foregoing Motion for Rehearing; and that every statement contained therein is within his knowledge and true and correct.

PATRICK EMMETT CLARKE

SUBSCRIBED AND SWORN TO before me on this 3rd day of December, 1981, to certify which, witness my hand and official sea.

Edith M. Pieringer

NOTARY PUBLIC for the State of Texas

My commission expires:
9/11/85

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellants' Motion for Rehearing has been delivered to each of the attorneys of record for Appellees, as specified below, by depositing the same, enclosed in a postpaid envelope, with the U. S. Postal Service, on this the 4th day of December, 1981, in accordance with Rule 414, Texas Rules of Civil Procedure.

PATRICK EMMETT CLARKE
Attorney for Appellants

WILLIAM H. BRIGHAM
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COURT OF APPEALS
SECOND SUPREME JUDICIAL DISTRICT
FORT WORTH TEXAS 76102-2184

FRANK A. MASSEY, Chief Justice
JOE SPURLOCK, Associate Justice
W. A. HUGHES, JR. Associate Justice
WALTER E. JORDAN, Associate Justice
RICHARD LEE BROWN, Associate Justice
DIXON HOLMAN, Associate Justice

YVONNE PALMER, Clerk
200 Civil Courts Building
Telephone 334-1166
Area Code 817

December 16, 1981

TO: ALL ATTORNEYS OF RECORD:

RE: CA No. 18586
Motion No.
Style: Alice Louise Miller, et al.
v.
Tim Curry, District Attorney, Tarrant County, et al.

Please take notice that the Court has today OVERRULED motion for rehearing of Appellants in the above styled cause.

Yours very truly,

Yvonne Palmer, Clerk

YP/gaf

CLERK'S OFFICE - SUPREME COURT

Austin, Texas Feb. 17, 1982

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of MILLER ET AL. v. CURRY, ET AL., No. C-987

was this day refused. No reversible error.

Very truly yours,
GARSON R. JACKSON, Clerk

FILED
ALEXANDER L. STEVAS
CLERK

No. 81-2107

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ALICE LOUISE MILLER, ET AL, *Petitioners*

v.

TIM CURRY, CRIMINAL DISTRICT ATTORNEY, ET AL, *Respondents*

On Petition for a Writ of Certiorari to the Supreme Court of Texas

Respondents' Brief in Opposition

FREDERICK M. SCHATTMAN
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(817) 334-1657

Attorney for Respondents
Tim Curry and Louis Barnett

Fort Worth Brief Printing Co., 410 South Jennings Street, Fort Worth, Texas 76104 Phone: 817-336-3451

LIST OF ALL PARTIES

Respondents Tim Curry, Criminal District Attorney of Tarrant County, Texas and Louis Barnett, former Assistant District Attorney of Tarrant County, Texas noting that Petitioners have wholly failed to comply with the requirements of Rule 21.1(b) of this Court submit the following list of the names of all parties in order that the Justices of this Court may evaluate possible disqualification or recusal:

Petitioners:

Alice Louise Miller, a minor
Malinda Wynell Miller, a minor
Rosalie Evelyn Miller, a minor
Charles A. Miller, next of friend of above named minors

Garzell Jashawn Murrell, a minor
Gerlynda Jashell Murrell, a minor
Ganadra Dena Murrell, a minor
Pauline Givens, next friend of above named minors

Respondents:

Honorable Tim Curry, Criminal District Attorney
Tarrant County, Texas

Mr. Louis Barnett, former Assistant District Attorney
Tarrant County, Texas

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No. 81-2107

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

ALICE LOUISE MILLER, ET AL, *Petitioners*

v.

TIM CURRY, CRIMINAL DISTRICT ATTORNEY, ET AL, *Respondents*

Respondents' Brief in Opposition

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents Tim Curry, Criminal District Attorney of Tarrant County, Texas and Louis Barnett, former Assitant District Attorney of Tarrant County Texas respectfully request that this Court deny the Petition for Writ of Certiorari to the Supreme Court of Texas in support of such request would show as follows:

REASONS WHY WRIT SHOULD BE DENIED

Petitioners advance two reasons why they believe the Writ of Certiorari should be granted in the cause *sub judice*. Petitioners have failed to invoke the jurisdiction

of this Court and attempt to bring before the Court nothing except well settled questions of federal law.

I.
CERTIORARI DOES NOT LIE TO THE SUPREME COURT OF TEXAS

Petitioners have requested a writ of certiorari to the Supreme Court of Texas implying that the same is authorized by 28 U.S.C. §1257(3). The highest court of Texas in which "a decision could be had" in the case at bar is the Texas Court of Appeals for the Second Supreme Judicial District. Following the decision of that Court, Petitioners made an application for writ of error to the Supreme Court of Texas which refused the application with the notation "no reversible error." Such review by the Supreme Court of Texas is discretionary. Under established law, certiorari lies not to the Supreme Court of Texas but to the Texas Court of Appeals, if it lies at all. *Adam v. Saenger*, 303 U.S. 59 (1938); *Bacon v. Texas*, 163 U.S. 207 (1896); *Western Union Telepgrah Co. v. Priester*, 276 U.S. 252 (1928). This petition should be dismissed. *cf. Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954).

II.
THE PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THE FEDERAL QUESTION UPON WHICH THEY SEEK REVIEW WAS TIMELY AND PROPERLY RAISED AT EACH STAGE OF THE PROCEEDINGS BELOW.

Under the express provisions of Rule 21.1(h) the Petitioners are required to set out in their statement of the

case that the federal question upon which review is sought was timely and properly raised at each stage of the state court proceedings.

Petitioners have failed, neglected, or refused to do so, preferring instead to wax sorrowfully about matters wholly outside of the record in this case. Petitioners obviously feel that the jurisdiction of this Court is invoked by way of appeal to sympathy through colorful fiction and prose.

Having failed to demonstrate that the federal question upon which review is sought was timely and properly raised the Petitioners have failed to invoke the jurisdiction of this Court. *cf. Cardinale v. Louisiana*, 394 U.S. 437 (1969)

III.
NO UNSETTLED AND IMPORTANT QUESTION OF FEDERAL LAW IS PRESENTED

Even assuming that the Petitioners' are able to correct the obvious deficiencies in their Petition such as those pointed out hereinabove, they bring to this Court for review well-settled questions of federal law.

It should first be noted that Petitioners sought money damages only from the prosecuting attorney and his former assistant. This Court, in no uncertain terms, recognized the need for and existence of *absolute* quasi-judicial immunity for prosecutors for their activities which were "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409 (1976).

While this Court did not attempt to set out with precision the exact limits of such immunity, it did make clear that the decision of *whether* to prosecute clearly fell within the heart of absolute immunity when it said:

> "We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present." *Imbler v. Pachtman*, 424 U.S. at 431.

Petitioners here seek nothing less than the abolition of prosecutorial immunity.

The second reason advanced by the Petitioners for granting the writ — that decedents were denied equal protection of the law and deprived of their lives without due process of law — is likewise absurd.

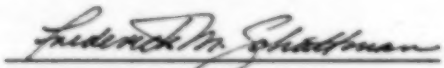
First, it should be noted that the question of denial of due process of law was not raised in the trial court and is therefore not properly before this Court. With regard to the equal protection claim it should be abundantly clear that the Petitioners' claim is that they are entitled to force a prosecution. In *Linda R. S. v. Richard D.*., 410 U.S. 614 (1973) this Court held that injured parties cannot compel a prosecution. Petitioners argument, reduced to its essence, is that they should be allowed to compel indirectly a prosecution by subjecting a prosecutor to

money damages if he will not file the case that the alleged injured party desires.

CONCLUSION

The Petition for writ of certiorari to the Supreme Court of Texas should be denied.

Respectfully submitted,



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Attorney for Respondents

CERTIFICATE OF SERVICE

I certify that three (3) copies of this Brief in Opposition have been served upon Petitioners' counsel in accordance with the Rules of this Court.

Dated this 10th day of June, 1982.

Frederick M. Schattman